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In the

Supreme Court of the United States

OCTOBER TERM, 1989

DONALD L. JACKSON AND
PATRICIA V. JACKSON, *Petitioners,*

v.

WESTERN FARM CREDIT BANK, *Respondent.*

*On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit acted within its discretion in denying a petition for a writ of mandamus seeking to reverse an order expunging a lis pendens, when the District Court's expungement order complied fully with state law and followed recent Ninth Circuit precedent which is not in conflict with any other court of appeals.

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Respondent Western Farm Credit Bank ("Farm Credit")¹ respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Ninth Circuit's denial of Petitioners' petition for writ of mandamus. The Ninth Circuit's opinion is unpublished; it

¹In the Ninth Circuit, the petition for writ of mandamus named the United States District Court For The Eastern District Of California as respondent and Farm Credit as real party in interest. That designation should be the status for the parties before this Court as well.

may be found at pages 16a-30a of the Petitioners' submission to this Court.

STATEMENT OF THE CASE

Farm Credit is a farmer-owned cooperative which provides agricultural credit under the supervision of the United States Farm Credit Administration. Petitioners Donald and Patricia Jackson operate agribusinesses in California's San Joaquin Valley. In 1983 Petitioners acquired 22,000 acres of farmland (the "Property") with \$23 million borrowed from Farm Credit. The next year Petitioners defaulted on their loans. In 1986 Farm Credit completed foreclosure and obtained title to the Property. Farm Credit thereafter sought to sell this huge parcel in order to curtail its losses of millions of dollars in annual carrying costs.

On December 12, 1988, three days before the scheduled closing of Farm Credit's sale of the Property, Petitioners commenced an action in the Eastern District of California and filed a *lis pendens* to block the Property's sale. In May, 1989, the District Court dismissed all of Petitioners' nineteen purported claims for relief and awarded Rule 11 sanctions against Petitioners. However, it dismissed two claims without prejudice and therefore allowed Petitioners, by posting a \$500,000 bond, to maintain the *lis pendens* until amendments to the complaint were addressed.

After amendments, on September 30, 1989, the District Court dismissed all claims raised in Petitioners' First Amended Complaint and ordered the *lis pendens*

expunged.² In dismissing Petitioners' allegations of violations of the Agricultural Credit Act of 1987 (the "1987 Act"), the District Court relied on *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1173 (9th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (1990), which held that no private right of action may be implied under the 1987 Act.

The order expunging the *lis pendens* due to Petitioners' failure to state a claim was neither exceptional nor unusual under California law.³ California requires that a trial court "shall" expunge a *lis pendens* when no claim is stated affecting title to or right to possession of property. Cal. Civ. Proc. Code §409.1(a).

On October 26, 1987, Petitioners filed a petition for writ of mandamus or prohibition in the Ninth Circuit seeking to reverse or stay the order expunging the *lis pendens*. After briefing and oral argument, on January 12, 1990, the Ninth Circuit issued its memorandum of decision denying the writ and stay.⁴ See Petition at 30a. When Farm Credit recorded expungement orders on January 17, 1990, the *lis pendens* was effectively abrogated.⁵

²The District Court dismissed four claims in the First Amended Complaint with prejudice on September 29, 1989. It dismissed three state common law claims—for intentional interference with business, negligent interference with business, and defamation—without prejudice on October 5, 1989. However, since none of the three amendable claims involves title to or right to possession of the Property, none could support a *lis pendens* on the Property under California law. See Cal. Civ. Proc. Code §409.1.

³State law governs expungement of *lis pendens*. *In re Texas Extrusion Corp.*, 844 F. 2d 1142, 1153 (5th Cir.), *cert. denied*, 57 U.S.L.W. 3313 (1988).

⁴On February 20, 1990, the Ninth Circuit panel unanimously denied Petitioners' request for rehearing.

⁵Under California law, a *lis pendens* becomes wholly ineffective to
(continued...)

Petitioners, however, waited four full months to file this petition and have not sought a stay from this Court. Thus, this petition now seeks review next term of an order which irrevocably removed a cloud on title some four months ago. For the reasons set forth below, the petition for certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS' DENIAL OF THE EXTRAORDINARY RELIEF OF MANDAMUS PRESENTS NO SUBSTANTIAL ISSUE.

The Ninth Circuit's denial of the petition for writ of mandamus raises no issue warranting review on certiorari.

Issuance of a writ is a matter of discretion with the court to which the petition is addressed. *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). In exercising its discretion, the Ninth Circuit recognized and acted in accordance with the well-established standards disfavoring appellate intervention by mandamus. See Petition at 18a-27a. This Court has summarized those standards as follows:

"[T]he writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations. The federal courts traditionally have used the writ only 'to confine an inferior court to a lawful exercise of its prescribed

³(...continued)

cloud title upon filing with the county recorder of a certified copy of the court's order of expungement. Cal. Civ. Proc. Code §409.1(b).

jurisdiction or to compel it to exercise its authority when it is its duty to do so.' In accord with this historic practice, we have held that only 'exceptional circumstances amounting to a judicial "usurpation of power"' will justify issuance of the writ. Moreover, we have held that the party seeking mandamus has the 'burden of showing that its right to issuance of the writ is "clear and indisputable."' (*Gulfstream Aerospace, Inc. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citations omitted))

The petition for a writ of mandamus in this case did not present circumstances requiring the issuance of a writ. Petitioners alleged no action by the District Court in excess of jurisdiction nor any judicial usurpation of power. Rather, Petitioners sought to block a routine expungement order which the District Court indisputably had the power to issue upon dismissal of meritless claims. Petitioners merely disputed the trial court's finding that their claims were meritless given the Ninth Circuit's rejection of an implied private right of action in *Harper*. See 878 F.2d at 1173. The Ninth Circuit was not required to issue a writ merely because Petitioners disagreed with its prior decision. And in the face of such contrary precedent, Petitioners hardly had the "clear and indisputable right" required for issuance of a writ.

Moreover, Petitioners had no entitlement to a writ because expungement of the *lis pendens* was, in the first instance, an issue for the discretion of the trial court. *Greenberg v. Superior Court*, 131 Cal. App. 3d 441, 446 (1982); see also *Peery v. Superior Court*, 29 Cal. 3d 837, 842 (1981). In the context of relief by mandamus, "[w]here a matter is committed to discretion, it cannot be

said that a litigant's right to a particular result is clear and indisputable." *Allied Chemical Corp. v. Daihatsu, Inc.*, 449 U.S. 33, 36 (1980) (quoting *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)).

Thus, the Ninth Circuit's denial of a writ presents no substantial issue.

II.

CERTIORARI ON THE PROPRIETY OF RELIEF BY
MANDAMUS WOULD BE AN INAPPROPRIATE VEHICLE
TO REVIEW THE UNDERLYING LEGAL ISSUE,
ON WHICH THERE IS NO DISAGREEMENT AMONG
THE CIRCUITS IN ANY EVENT.

Petitioners purport to invoke a conflict among the circuits on the implied private right of action issue as justification for certiorari. Petition at 54-60. This argument fails for three reasons.

First, certiorari to review denial of a writ of mandamus would not properly present the merits of the implied private right of action issue. This petition would merely require consideration of whether the Ninth Circuit was entitled to deny extraordinary relief when a trial court followed that Circuit's precedent. The correctness of that precedent would not be before the Court in determining whether or not the standards for extraordinary relief were properly applied.

Second, no conflict exists between the circuits in any event. Petitioners assert that the split opinion of an Eighth Circuit panel in *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989), *vacated and rehearing granted* (Dec. 7, 1989) conflicts with the Ninth Circuit's decision in *Harper*. But Petitioners fail to inform the Court that the Eighth Circuit has vacated its panel's

decision and is rehearing the matter *en banc*. Petitioners also fail to inform the Court that the Tenth Circuit has agreed with the Ninth Circuit's conclusions in *Harper*. See *Griffin v. Federal Land Bank of Wichita*, No. 89-3070, ___ F.2d ___, (10th Cir. May 2, 1990) (WL 54354). Thus, the circuit court decisions on the 1987 Act are in accord that no private right of action exists.

Third, Petitioners' request that this Court review their right to bring an action under the 1987 Act is premature. The Ninth Circuit has not yet decided that issue with respect to these Petitioners. It has merely denied their request for extraordinary relief.⁶ Petition at 24a-26a. Indeed, Petitioners have argued that their claim arises under a section of the 1987 Act, 12 U.S.C. §2291a, which is distinguishable from the provision addressed in *Harper*. See Petition at 24-26. No court of appeals has specifically addressed the availability of a private right of action under 12 U.S.C. §2291a. In due course Petitioners may appeal and the Ninth Circuit may determine that Petitioners have no private right of action under that section. But there is no reason for this Court to consider that section in advance of the court of appeals.

⁶Petitioners erroneously state that the Ninth Circuit has "denied" their appeal. Petition at 20. In fact, because certain claims not related to the *lis pendens* remain pending in the trial court, the Ninth Circuit dismissed for lack of jurisdiction Petitioners' attempted interlocutory appeal from the order dismissing those of Petitioners' claims asserted under the 1987 Act. Petition at 35a; see also note 2, *supra*.

III.

**CERTIORARI WOULD NOT ASSIST
THESE PETITIONERS INDIVIDUALLY.**

The expungement of the lis pendens was completed on January 17, 1990 and has been of record at the county recorders' offices after that time. Farm Credit has been free to encumber or sell the Property as it wishes ever since. Petitioners did not request a stay to limit Farm Credit's rights after the Ninth Circuit's decision. Instead, they waited four months to file this petition. Simply put, the horse is already out of the barn, and certiorari could not bring it back. There would thus be no benefit to these individual Petitioners from this Court's review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: May 30, 1990

Respectfully submitted,

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